

CORRECTED OPINION: BOARD OF APPEALS
CODE SECTION for
MONTGOMERY COUNTY

Stella B. Werner Council Office Building
100 Maryland Avenue
Rockville, Maryland 20850
(240) 777-6600

www.montgomerycountymd.gov/content/council/boa/board.asp

Case No. S-2621

**PETITION OF CHESAPEAKE PSYCHOLOGICAL SERVICES
OF MARYLAND, LLC, BY KATHLEEN NADEAU**

OPINION OF THE BOARD

(Effective Date of Opinion: January 20, 2005)

Case No. S-2621 is an application for a special exception pursuant to **Section 59-G-2.38 (Offices, Professional – Non-resident)** of the Zoning Ordinance to permit: 1) Offices for the Petitioner. Offices for other licensed Psychologists, who work as independent contractors on a part-time basis; their combined hours are the equivalent of no more than five full-time Psychologists. The Petitioner and the other staff Psychologists will periodically supervise the work of doctoral students and post-doctoral Psychologists. 2) A part-time office manager, who works approximately 30 hours per week. 3) Hours of operation from 7:30 a.m. to 9:00 p.m., Monday through Friday and 9:00 a.m. to 5:00 p.m., on Saturday. 4) Parking in the driveway for two automobiles, additional metered and garage parking is available across the street.

Pursuant to the provisions of Section 59-A-4.125 of the Zoning Ordinance, the Hearing Examiner for Montgomery County convened a public hearing on the application on November 15, 2004, and on December 10, 2004, issued a Report and Recommendation for approval of the special exception.

The subject property is in Lot 4, Evanswood Subdivision; located at 8607 Cedar Street, Silver Spring, Maryland, 20910, in the R-60 Zone.

Decision of the Board: Special Exception **granted**, subject
to conditions enumerated below.

The Board of Appeals considered the Hearing Examiner's Report and Recommendation at its Worksession on December 15, 2004. After careful consideration and review of the record in the case, the Board adopts the Report

and Recommendation and grants the special exception subject to the following conditions:

1. Petitioners shall be bound by all of their testimony and exhibits of record, and by the testimony of their witnesses and representations of counsel identified in this report.
2. Petitioners shall participate in the Silver Spring Parking Lot District Program and pay the *ad valorem* tax in lieu of satisfying the number of required parking spaces that are not on the site.
3. The special exception will operate with a maximum of five mental health practitioners each working a 40 hour week, or the equivalent (*i.e.*, a maximum of 200 mental health practitioner hours per week, whether or not there are more than five practitioners working in any given week).
4. Petitioners will keep a log or other non-confidential record of the hours that each person is working at the subject site, which will be available for review, upon request, by the Department of Permitting Services.
5. The hours of operation will be 7:30 a.m. to 9 p.m., Monday through Friday, and 9 a.m. to 5 p.m. on Saturday, but Dr. Nadeau may use the subject site on Sunday to do administrative work.
6. Petitioners will make information available to clients about the local public parking facilities.
7. There will be no more than one group session at any one time, and no more than three group sessions per week. A maximum 8 clients will participate in any group session.
8. Petitioners may not post the sign proposed in Exhibit 10 until they obtain a permit therefor pursuant to Code §59-F-9.1(a).
9. The Board's approval of the special exception, including the proposed addition which will modify the exterior of the premises, does not excuse Petitioners from obtaining all necessary permits for the addition and maintaining the residential character of the structure.

On a motion by Louise L. Mayer, seconded by Wendell M. Holloway, with Angelo M. Caputo, Donna L. Barron and Allison Ishihara Futlz, Chair in agreement, the Board adopted the following Resolution:

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland that the opinion stated above is adopted as the Resolution required by law as its decision on the above-entitled petition.

Allison Ishihara Fultz
Chair, Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 20th day of January, 2005.

Katherine Freeman
Executive Secretary to the Board

NOTE:

Any request for rehearing or reconsideration must be filed within fifteen (15) days after the date the Opinion is mailed and entered in the Opinion Book (See Section 59-A-4.63 of the County Code). Please see the Board's Rules of Procedure for specific instructions for requesting reconsideration.

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County, in accordance with the Maryland Rules of Procedure.

**BEFORE THE MONTGOMERY COUNTY
BOARD OF APPEALS**

**Office of Zoning and Administrative Hearings
Stella B. Werner Council Office Building
Rockville, Maryland 20850
(240) 777-6660**

IN THE MATTER OF: *
Chesapeake Psychological Services of MD, LLC *
and *
Kathleen Nadeau, PHD *
Petitioners *

Kathleen Nadeau *
S-2621

For the Petition *

Norman Knopf, Esquire *
Attorney for Petitioners *

Martin Klauber, Esquire, People's Counsel *
In Support of the Petition *

Before: Martin L. Grossman, Hearing Examiner

Board of Appeals Case No.

(OZAH Referral No. 05-06)

HEARING EXAMINER'S REPORT AND RECOMMENDATION

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I. STATEMENT OF THE CASE

Petition No. S-2621, filed on June 24, 2004, seeks a special exception, pursuant to §59-G-2.38 of the Zoning Ordinance, to permit a professional (*i.e.*, psychologist's) office for use by non-resident practitioners at 8607 Cedar Street in Silver Spring. The property is approximately 5,000 square feet in area and is described as Lot 4 of Section One of the Evanswood subdivision. It is zoned R-60. The Petitioners propose initially to operate the use within the existing 1,248 square foot home located on the property, and in 2005, to add and use a small addition.

On August 16, 2004, the Board of Appeals issued a notice (Exhibit 13) that a hearing in this matter would be held by the Hearing Examiner for Montgomery County on December 6, 2004. On October 8, 2004, the Hearing Examiner issued a corrected notice (Exhibit 15) indicating that the hearing in this matter would be held on November 15, 2004, at 1:30 p.m., in the Second Floor Hearing Room of the Stella B. Werner Council Office Building.

Technical Staff at the Maryland-National Capital Parks and Planning Commission (M-NCPPC), in a memorandum dated November 4, 2004, recommended approval of the petition, with conditions (Exhibit 15).¹ By letter dated November 9, 2004, the Planning Board for Montgomery County indicated its unanimous recommendation of approval, with the same conditions as recommend by Technical Staff.

A public hearing was convened as scheduled on November 15, 2004, and testimony was presented by Petitioner, Kathleen Nadeau, Ph.D. There were no other witnesses, although Martin Klauber, the People's Counsel, participated in the hearing and expressed his support for the Petition. The record was held open until November 22, 2004, for receipt of the transcript. There is no opposition in this case.

II. BACKGROUND

A. The Subject Property and Surrounding Neighborhood

¹ The Technical Staff Report is frequently quoted and paraphrased herein.

As noted above, the subject property is located at 8607 Cedar Street in Silver Spring and is described as Lot 4 of Section One of the Evanswood subdivision. It is zoned R-60. The subject site is 5,000 square feet in area and is improved with a 1,248 square foot, two story, brick home built approximately 75 years ago. A concrete driveway accesses Cedar Drive and has space to park four vehicles. A photo of the subject property (Exhibit 22(a)) is shown below:



The site is located on the edge of North Silver Spring, across Cedar Street from the Silver Spring Central Business District (CBD). According to Technical Staff, the homes on Cedar Street, between Ellsworth Drive and Pershing Drive are somewhat isolated from other single-family homes in the neighborhood by the Chelsea School, a private school located behind these homes (labeled “Academy of the Holy Names” on the Maps shown below). Across Cedar Street, in the CBD, there is a large parking lot, and behind that a high-rise residential development. The surrounding properties on the east side of Cedar Street are zoned R-60. The property across Cedar Street is zoned CBD R-1. The subject site and the



surrounding area are seen on the aerial photo and “planimetric” map shown below.

Vehicular access to the subject property is from Cedar Street, and four off-street parking spaces are provided. Cedar Street has metered parking in front of the property, and a public parking garage is located across the street. The subject site is within the Silver Spring Parking Lot District. The current area of the subject site would require five parking spaces. The proposed addition would require approximately two more spaces. The additional spaces required beyond the four on-site would be provided in the parking district, which would result in a parking assessment Petitioners have agreed to pay. *See*, Tr. 55-56 and recommended condition number two at the end of this report.

Pedestrian access to the site is via sidewalks on Cedar Street. The site is located approximately 3,000 feet from the Silver Spring Metro Station. Technical Staff notes that the site does not qualify for a parking reduction, “but is not an unreasonable walk.”

Other nearby special exceptions are S-1065, a law practice located at 8613 Cedar Street, and S-808, a doctor’s office, located at 717 Pershing Drive.

B. The Master Plan

The property is located within the area covered by the *North and West Silver Spring Master Plan*, approved and adopted in August 2000. According to Technical Staff, master plan policies, for many years, have planned for a transition of uses from the properties at the edge of the neighborhood to those of the interior. The subject use would provide such a transition, and the current Master Plan expressly calls for the use sought by Petitioners. Specifically, the Master Plan recommends, at page 44, “[r]etain[ing] the designation that properties on Cedar Street between Ellsworth Drive and Pershing Drive are suitable to apply for the non-resident professional office special exception.” The property (labeled #31) is also depicted on the Master Plan’s “Map 18” on page 45 as being suitable for this special exception.

C. The Proposed Use

Petitioners seek to use the subject property as a psychologist’s office, run by Petitioner Kathleen Nadeau, who is a Ph.D. Psychologist, licensed in Maryland. She is also the sole partner in co-Petitioner, Chesapeake Psychological Services of MD, LLC. Tr. 16. The subject property is owned by Petitioner Nadeau and her husband, Bonnard Teegarden, and leased by them to Petitioner Chesapeake Psychological Services of MD, LLC (Exhibit 9).

The proposed practice is set forth in Petitioners’ Statement of Operations (Exhibit 3(a)), which is quoted below:

Chesapeake Psychological Services of Maryland, LLC is solely owned by Kathleen G. Nadeau, Ph.D., a psychologist who has been in practice for 34 years in the Washington, DC area. Dr. Nadeau is an internationally recognized expert in Attention Deficit/Hyperactivity Disorder and is the director of the clinic.

Other psychologists will work at the clinic as independent contractors on a part- time basis. They will work from several hours to several days each

week. Their combined hours are the equivalent of no more than five full-time psychologists. In addition to licensed psychologists, Dr. Nadeau and the other staff psychologists periodically supervise the work of doctoral students and post-doctoral psychologists working toward licensure.

There is also a part-time office manager who works approximately 30 hours per week.

Our hours of operation are from 7:30 a.m. to 9:00 p.m., Monday through Friday, and 9:00 a.m. to 5:00 p.m. on Saturday.

Our clients are children, adolescents and adults who seek diagnosis, testing, and counseling at our center.

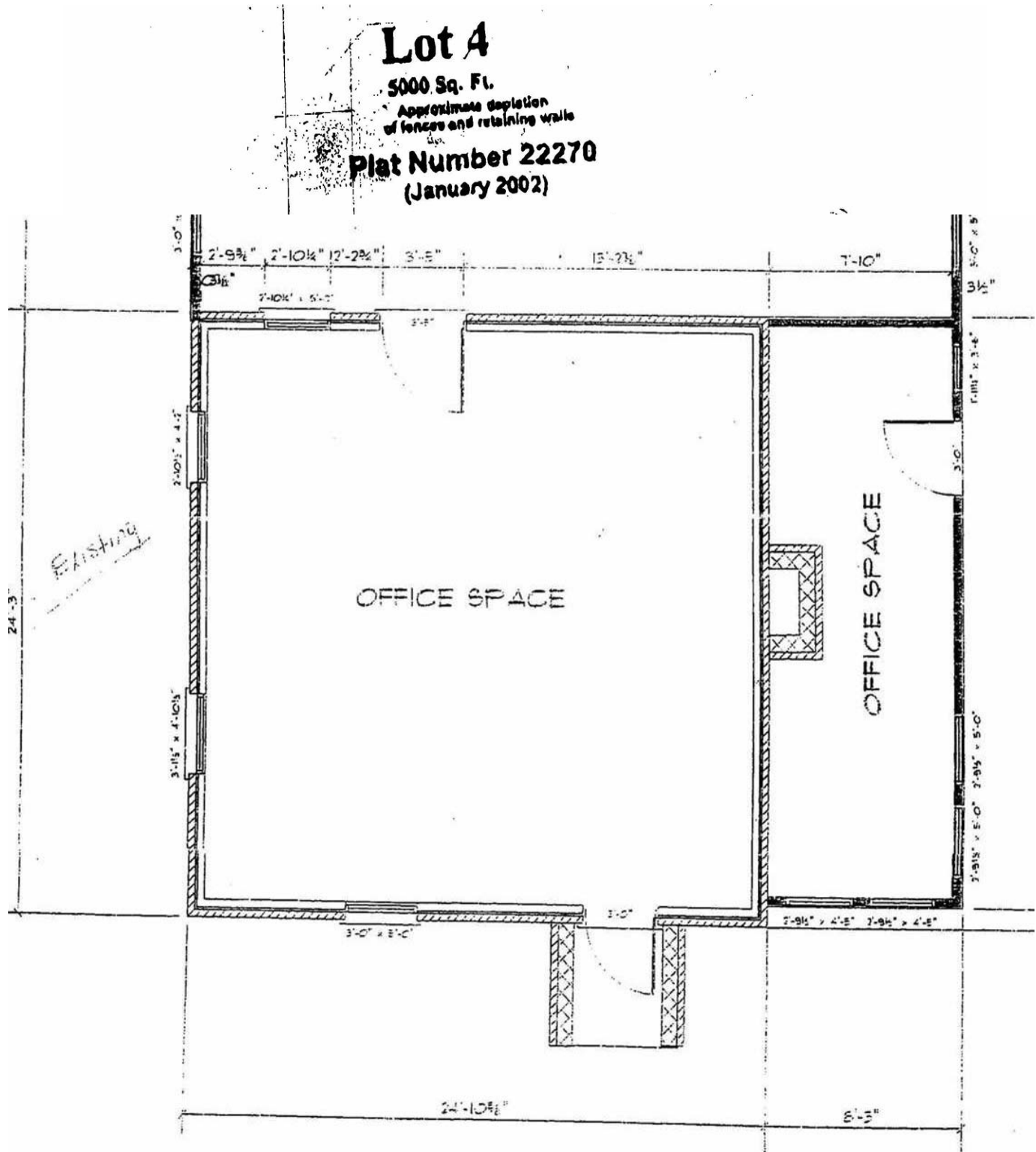
We use no special equipment in our work. Each office has a personal computer.

Typically, our clients are seen for one hour or more at each appointment. At any given point in time we have an average of three to four clients at our clinic with the exception of occasional counseling groups of 6-8 clients who meet for 1.5 hours each week. Only one counseling of groups is scheduled at a time period and a maximum of 3 such group sessions will be held per week.

Our driveway can accommodate two automobiles. In addition, there is metered parking directly in front of the building and along the street. County parking is available in a lot and a parking garage directly across the street.

In general, our practice is quiet, low key and does not involve large numbers of clients entering and leaving the clinic.

Petitioners have also supplied floor plans (Exhibits 11(a) and (b)) and elevations (Exhibit 11(c), which depict both the current house and the area to be added. Shown below is the First Floor Plan from Exhibit 11(a), followed by the Right Side Elevation





RIGHT SIDE ELEVATION

SCALE: $\frac{1}{4}'' = 1'-0''$

from Exhibit 11(c):

The special exception use will be typical of the normal operation of a psychologist's office, and should have no adverse effects on the neighbors. Tr. 54-55. Initially, the use will be conducted in the house as it currently constructed. Tr. 37. A rear door will be utilized as the primary entrance during that period because it is wheelchair accessible. Tr. 28-29. No one will live in the house. Petitioners plan to add an addition in 2005, and when that is completed, the front entrance will be the primary access. The planned two-story addition will be 14 by 20 feet, not counting the porch. See Exhibits 11(a), (b) and(c).

The hours of operation will be 7:30 a.m. to 9 p.m., Monday through Friday, and 9 a.m. to 5 p.m. on Saturday, but Dr. Nadeau may use the subject site on Sunday to do administrative work. Currently, the total number of professionals working in the business adds up to fewer than three full-time people, but once the addition is completed that will expand to five full-time practitioners, or the equivalent in professional hours worked. In

other words, there may be more than five practitioners sharing the six offices at the site, but there will be a maximum of 200 mental health practitioner hours worked per week, whether or not there are more than five practitioners putting in hours during that period.

Conditions are recommended that limit both the hours of operation and the number of professional hours that may be expended at the subject site in any given week. A condition is also recommended limiting group sessions to no more than one group session at any one time, and no more than three group sessions per week. A maximum of 8 clients will participate in any group session. Petitioners are agreeable to all these conditions. Tr. 57-64.

The submitted landscaping exhibit indicates that there is a mixture of bushes (evergreen, azaleas and spreading yews) in the front yard, and a maple tree located in front of the house. The terraced rear yard with gazebo is improved with additional landscaping.

Technical Staff opined that the landscaping serves to enhance the residential appearance of the building “although the proposed use is not a detriment to this attribute of the property.” In the side yards, where landscaping will not be as effective, existing picket fencing will be replaced with new picket fencing or a 6 foot tall, wooden privacy fencing. On the side of the proposed addition, a 6 foot tall privacy fence will extend from the front of the property to the rear property line. On the opposite side, the privacy fence will only be installed on the side of the back yard. The plans for privacy fencing were made, in consultation with adjacent property owners, to screen the new addition and the use.

As to lighting, wall and ceiling mounted residential fixtures are proposed using standard 75-watt bulbs. Path lighting along the sidewalk, consisting of directed 11-watt ground lanterns, is proposed. Technical Staff concluded that the proposed lighting will provide safe access for clients to the use during hours of lower daylight, particularly in winter, and the lighting is typical of any residential use.

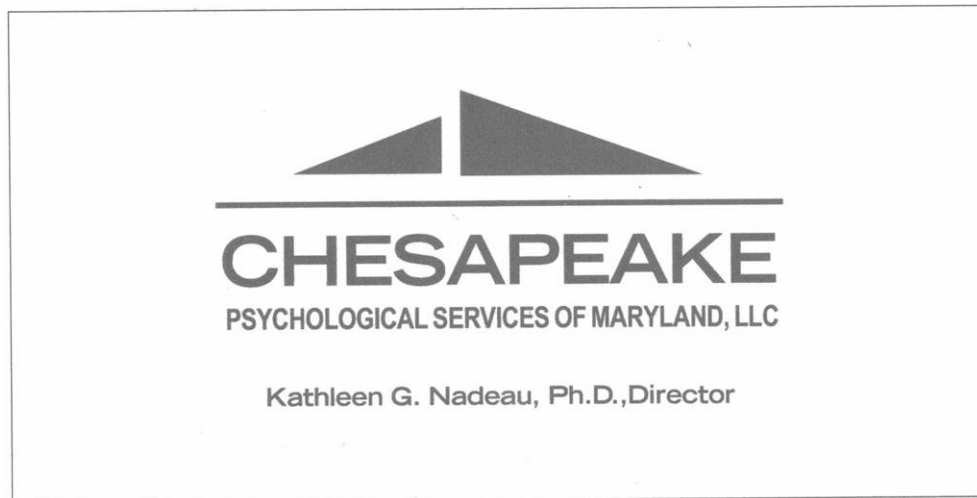
Finally, Petitioners propose an unlighted, 1 foot by 2 foot, wooden sign, for the front yard. It is depicted in Exhibit 10, which is shown below.

Although this proposed sign was not discussed either in the Technical Staff report or at the hearing, the Hearing Examiner's review of the Zoning Ordinance reveals that, under Code §59-F-9.1(a), even this two square foot sign requires a permit because it will be permanently posted in a residential zone and does not meet any of the exceptions listed in Code §59-F-8. A condition is therefore recommended requiring a permit prior to posting of the sign.

D. Public Facilities

Transportation planning staff reviewed the proposed operations and determined that weekday, peak hour trips will not exceed 30, thereby eliminating the need for a traffic study under Local Area Transportation Review (LATR). Policy Area Transportation Review (PATR) was eliminated in the 2003-2005 Annual Growth Policy-Policy Element,

Wooden sign 1' x 2' to be created + posted in front yard near sidewalk (no illumination)



and therefore is inapplicable. Fire, police and water and sewer service are all available at the subject site. Tr. 53-54. Given the nature of the special exception, it will have no impact on school capacity.

E. Environment

Technical Staff reports that, on April 20, 2004, Petitioners received a forest conservation recommendation from Environmental Planning staff, which confirmed that the property is not subject to a tree save plan and is not in a special protection area. The proposed use will not result in any clearing of existing forest or trees.

F. Community Response.

There has been no community reaction to the subject Petition. The People's Counsel supports granting the special exception.

III. SUMMARY OF THE HEARING

The only witness to testify at the hearing was Petitioner, Kathleen Nadeau. Petitioners' counsel stated, at the outset of the hearing, that Petitioner Nadeau's husband, Bonnard Teegarden, is a co-owner of the subject property (along with Petitioner Nadeau), and that Mr. Teegarden joined in the application.² Tr. 6-9.

A. Petitioner's Case

Dr. Nadeau testified that she is a Ph.D clinical psychologist, licensed in Maryland. She is also the sole partner in co-Petitioner, Chesapeake Psychological Services of MD, LLC. Tr. 16. She and her husband own the subject property. Dr. Nadeau identified photographs which she took (Exhibit 8(a)), noting that they depict the view from the front door of the subject property. She testified that there is a construction trailer in the parking lot across the street because there will be a high rise condo constructed at that site, and looking to the southwest from the subject property is a new parking garage with an entrance on Ellsworth Drive. Tr. 17-20. Dr. Nadeau then identified the photos she took in Exhibits 8(b) and (c), all depicting the subject property from different views some months ago while renovations were in progress. She also identified Exhibit 22(a) as a current photo of the subject property.

Dr. Nadeau testified that she hopes to put an addition on the house in 2005 (Tr. 28), but until that time the present structure will house the office use. Tr. 37. The rear entrance, as depicted in the photo labeled "Rear" in Exhibit 8(b), which is wheelchair accessible, will be the primary entry until the addition is built. Tr. 28-29. There will be no-one living in the house. Dr. Nadeau explained the planned addition using the floor plan and elevation exhibits, 11(a), (b) and (c). The planned addition would be to the rear of the house, would rise two stories and be 14 by 20 feet (not counting the porch). Tr. 33. Once the addition is finished, the front door will become the main entrance. The front elevation will not change with the addition. Tr. 35.

The landscaping, as depicted in Exhibit 5(b), currently exists and would remain the same after the addition. Tr. 37. The lighting would be consistent with residential use, but adequate for safety purposes.

Petitioner's Statement of Operations, Exhibit 3a, explains the workings of the intended use. At the moment, Dr. Nadeau is the only full time person, and she has been in practice for many years, currently just two blocks down the street. A number of different mental health professionals work part-time for her. Although there may be a fairly lengthy list of people who work for Dr. Nadeau, some of them work only five hours a week, and some 16 hours a week, and none of them full-time. She hopes, at some point in the not to distant future, to have one other individual work with her full-time and begin to take over some of the administrative duties. Tr. 38-39. Currently, the total of all professionals working in this business (including Dr. Nadeau) adds up to fewer than 3 full-time people. In the Statement of Operations, a possible expansion to five full-time psychologists is anticipated, and Dr. Nadeau

² Dr. Nadeau is the sole owner of Petitioner, Chesapeake Psychological Services of MD, LLC, and that entity leases the subject property from Dr. Nadeau and her husband, Mr. Teegarden (Tr. 6-8, Exhibit 9). Mr. Teegarden, however, is not listed as a Petitioner on the Petition (Exhibit 1(a)), nor did he sign that document. That fact does not require denial of the Petition because the testimony and the lease agreement (Exhibit 9) demonstrate that the actual Petitioners have sufficient interest in the subject property to proceed. Zoning Ordinance, §59-A-4.22(a)(6).

is committed to that limit. The only time that all are there is for a weekly staff meeting, for a two hour period on Fridays, but other than that, it ranges from one to three people typically at any one point in time. After the expansion to five, it would probably range from one to four. It's extremely unusual for every office to be used all the time. Tr. 39-41. Offices are shared.

In addition to the licensed or trained mental health professionals, Dr. Nadeau has had, and will continue to have, a maximum of two psychology interns and externs, affiliated with local universities, that she supervises. They are rarely there at the same time. With the addition there would be six offices, so the maximum would be six clients coming in, but it would be extremely rare for all six offices to be in use simultaneously. There will be occasions in which groups which sessions would result in a maximum of 6 to 8 people, and that would be occurring maybe two to three times a week. Tr. 43-44. There will be no more than three group sessions a week. There would never be two group sessions at one time because there is only one room that can accommodate a group.

Hours of operation are Monday through Friday, 7:30 a.m. to 9 p.m., and Saturdays, 9 a.m. to 5 p.m. there are no hours on Sunday. Tr. 45. Ample parking is available in County garages, and there is 2 hour meter parking available on Cedar Street as well. Tr. 46. The subject property has a double driveway, which will also be used. Tr. 51.

After the addition, much more than 25 percent green area will remain, and the single-family character and basic residential appearance of the building will be maintained. Tr. 47. As shown in the Landscape Plan, there will be a privacy fence erected on either side of the house. There are three rental houses that are actually owned by Chelsea School behind the property that are residential in use. Along Cedar there are residences, and there is a resident physicians office two houses down to the right and an attorney's office. Tr. 49-50

Dr. Nadeau testified that the back yard would not be used for the special exception use, and that there would not be any noise, vibrations, fumes, orders, dust, or other activity coming from the use of the premises that would be disturbing to the neighbors. Tr. 51. Once the addition is completed, client traffic will enter from the front of the house. She characterized Cedar Street as fairly heavily trafficked, especially at the beginning and end of the day.

Dr. Nadeau further testified that the special exception use would not disturb the neighbors' enjoyment of their property, and that it would not have any adverse effects on them. In her opinion, the improvements she has made to the subject property have made it more attractive. The lighting is standard residential lighting. "They're just old carriage lights by the entry way, porch lights. And there are little mushroom lights along the sidewalk. They're very commonly used in residential properties." Tr. 53.

The property has water and sewer service, and there is a firehouse in the area, as well as a police station. The use will not impose any adverse effect on the health or safety of the neighbors in the community.

There will be one to three clients visiting this site at any one time; sometimes the client may be a family arriving in a single vehicle. Tr. 54. The use will be typical of the normal operation of a psychologist's office. Some of the people who work for Dr. Nadeau are not psychologists, but are counselors or social workers. Tr. 54-55. There will be no physicians.

Dr. Nadeau realizes that she will have to pay a parking assessment because the subject property is located within the Silver Spring Parking District, and she has no problem with that. Tr. 55-56.

On cross-examination, Dr. Nadeau agreed to the following conditions (Tr. 57-64):

1. The special exception will operate with a maximum of five mental health practitioners, each working a 40 hour week, or the equivalent (*i.e.*, a maximum of 200 mental health practitioner hours per week, whether or not there are more than five practitioners working in any given week).
2. Dr. Nadeau will keep a log or other non-confidential record of the hours that each person is working at the subject site, which will be available for review, upon request, by the Department of Permitting Services.
3. The hours of operation will be 7:30 a.m. to 9 p.m., Monday through Friday, and 9 a.m. to 5 p.m. on Saturday, but Dr. Nadeau may use the subject site on Sunday to do administrative work.
4. Petitioners will make information available to clients about the local public parking facilities.
5. There will be no more than one group session at any one time, and no more than three group sessions per week. A maximum 8 clients will participate in any group session.

B. People's Counsel

Martin Klauber, the People's Counsel, made the following statement in support of the Petition (Tr. 68):

I'd like to reiterate my support of this special exception with conditions and note that this petitioner has in the landscape plan provided for a buffering on either side of the property for her neighbors. And I think that even given the transition area that this is, it's a reflection of this petitioner's sensitivity to individuals and their needs. And it certainly goes along with the profession that she practices, and I think the landscape plan is an example of that, and I think this is a good use at this location and she's even made it more so by being sensitive to her neighbors.

IV. FINDINGS AND CONCLUSIONS

A special exception is a zoning device that authorizes certain uses provided that pre-set legislative standards are met, that the use conforms to the applicable master plan, and that it is compatible with the existing neighborhood. Each special exception petition is evaluated in a site-specific context because a given special exception might be appropriate in some locations but not in others. The zoning statute establishes both general and specific standards for special exceptions, and the Petitioners have the burden of proof to show that the proposed use satisfies all applicable general and specific standards. Based on the testimony and evidence of record, the Hearing Examiner concludes that the instant petition meets the general and specific requirements for the proposed use, as long as Petitioners comply with the conditions set forth in Part V, below.

A. Standard for Evaluation

The standard for evaluation prescribed in Code § 59-G-1.21 requires consideration of the inherent and non-inherent adverse effects on nearby properties and the general neighborhood from the proposed use at the proposed location. Inherent

adverse effects are “the physical and operational characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations.” Code § 59-G-1.21. Inherent adverse effects, alone, are not a sufficient basis for denial of a special exception. Non-inherent adverse effects are “physical and operational characteristics not necessarily associated with the particular use, or adverse effects created by unusual characteristics of the site.” *Id.* Non-inherent adverse effects, alone or in conjunction with inherent effects, are a sufficient basis to deny a special exception.

Technical Staff have identified seven characteristics to consider in analyzing inherent and non-inherent effects: size, scale, scope, light, noise, traffic and environment. For the instant case, analysis of inherent and non-inherent adverse effects must establish what physical and operational characteristics are necessarily associated with a non-resident psychologist’s office. Characteristics of the proposed non-resident, psychologist’s office use that are consistent with the “necessarily associated” characteristics of non-resident psychologist’s office uses will be considered inherent adverse effects, while those characteristics of the proposed use that are not necessarily associated with non-resident psychologist’s office uses, or that are created by unusual site conditions, will be considered non-inherent effects. The inherent and non-inherent effects thus identified must then be analyzed, in the context of the subject property and the general neighborhood, to determine whether these effects are acceptable or would create adverse impacts sufficient to result in denial.

Technical Staff determined that the physical and operational characteristics necessarily associated with a non-resident psychologist’s office include daily arrival and departure of staff, hourly entry and exit of clients, intake evaluations, ongoing psychological sessions, and occasional group sessions. Staff also suggested that non-inherent characteristics of a psychology clinic might include expanded group sessions or workshops, outdoor events, and special deliveries or loading. Because none of those non-inherent activities are proposed for the subject use, Technical Staff found no basis for denial of the Petition. The Hearing Examiner agrees.

The Hearing Examiner finds that the physical and operational characteristics of the proposed psychologist’s office are no different from those typically encountered with any psychologist’s office. Therefore, based on the evidence in this case, and considering size, scale, scope, light, noise, traffic and environment, the Hearing Examiner concludes that there are no non-inherent adverse effects arising from the subject use.

B. General Conditions

The general standards for a special exception are found in Section 59-G-1.21(a). The Technical Staff report, the other exhibits and the testimony of the Petitioner Nadeau provide ample evidence that the general standards would be satisfied in this case.

Sec. 59-G-1.21. General conditions.

§5-G-1.21(a) -*A special exception may be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that the proposed use:*

(1) Is a permissible special exception in the zone.

Conclusion: A nonresidential professional office use is a permissible special exception in the R-60 Zone, pursuant to Code § 59-C-1.31, “[i]f designated as being suitable for nonresidential professional offices on an approved and adopted master or sector plan,” which is the case here.

(2) *Complies with the standards and requirements set forth for the use in Division 59-G-2. The fact that a proposed use complies with all specific standards and requirements to grant a special exception does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require a special exception to be granted.*

Conclusion: The proposed use complies with the specific standards set forth in § 59-G-2.38 for a nonresident’s professional office use, as outlined in Part C, below.

(3) *Will be consistent with the general plan for the physical development of the District, including any master plan adopted by the Commission. Any decision to grant or deny special exception must be consistent with any recommendation in a master plan regarding the appropriateness of a special exception at a particular location. If the Planning Board or the Board’s technical staff in its report on a special exception concludes that granting a particular special exception at a particular location would be inconsistent with the land use objectives of the applicable master plan, a decision to grant the special exception must include specific findings as to master plan consistency.*

Conclusion: The property is located within the area covered by the *North and West Silver Spring Master Plan*, approved and adopted in August 2000. According to Technical Staff, master plan policies, for many years, have planned for a transition of uses from the properties at the edge of the neighborhood to those of the interior. The subject use would provide such a transition, and the current Master Plan expressly calls for the use sought by Petitioners. Specifically, the Master Plan recommends, at page 44, “[r]etain[ing] the designation that properties on Cedar Street between Ellsworth Drive and Pershing Drive are suitable to apply for the non-resident professional office special exception.” The property (labeled #31) is also depicted on the Master Plan’s “Map 18” on page 45 as being suitable for this special exception.

Thus, the Hearing Examiner finds that the planned use is consistent with the applicable Master Plan.

(4) *Will be in harmony with the general character of the neighborhood considering population density, design,*

scale and bulk of any proposed new structures, intensity and character of activity, traffic and parking conditions, and number of similar uses.

Conclusion: The proposed use will be in harmony with the general character of the neighborhood because it will both blend in with the residential uses in the surrounding neighborhood and serve as a transition to the other uses in the bordering CBD. The proposed use fits this context, as recommended by the Master Plan, and it will not generate any significant change in traffic conditions. Thus, the subject use will be in harmony with its surroundings.

(5) *Will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: The Hearing Examiner concludes that the proposed use will not be detrimental to the peaceful enjoyment, economic value or development of surrounding properties at the site. Tr. 53.

(6) *Will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: Based on the nature of the proposed use (i.e., a psychologist's office), the special exception would cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare or physical activity at the subject site. Tr. 51.

(7) *Will not, when evaluated in conjunction with existing and approved special exceptions in any neighboring one-family residential area, increase the number, intensity, or scope of special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area. Special exception uses that are consistent with the recommendations of a master or sector plan do not alter the nature of an area.*

Conclusion: Technical Staff noted only two other special exception uses in the area, S-1065, a law practice located at 8613 Cedar Street, and S-808, a doctor's office, located at 717 Pershing Drive. Given that this transitional area is expressly recommended for these professional office uses, the Hearing examiner concludes that the proposed special exception will not increase the number, scope, or intensity of special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area.

- (8) *Will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: The evidence supports the conclusion that the proposed use would not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site.

- (9) *Will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage and other public facilities.*

Conclusion: Petitioners testified that there were adequate public facilities serving the office in question. Technical Staff also found, and the Hearing Examiner agrees, that the subject property is adequately served by the specified public services and facilities.

- (i) *If the special exception use requires approval of a preliminary plan of subdivision, the adequacy of public facilities must be determined by the Planning Board at the time of subdivision review. In that case, subdivision approval must be included as a condition of the special exception. If the special exception does not require approval of a preliminary plan of subdivision, the adequacy of public facilities must be determined by the Board of Appeals when the special exception is considered. The adequacy of public facilities review must include the Local Area Transportation Review and the Policy Area Transportation Review, as required in the applicable Annual Growth Policy.*

Conclusion: The special exception sought in this case would not require approval of a preliminary plan of subdivision. Therefore, the public facilities review must include analysis of the Local Area Transportation Review (“LATR”). Transportation planning staff reviewed the proposed operations and determined that weekday, peak hour trips will not exceed 30, thereby eliminating the need for a traffic study under Local Area Transportation Review (LATR). Policy Area Transportation Review (PATR) was eliminated in the 2003-2005 Annual Growth Policy-Policy Element, and therefore is inapplicable. Fire, police and water and sewer service are all available at the subject site. Tr. 53-54. Given the nature of the special exception, it will have no impact on school capacity. Therefore, the Technical Staff concludes, as does the Hearing Examiner, that the use will be served by adequate public facilities.

- (ii) *With regard to findings relating to public roads, the Board, the Hearing Examiner, or the District Council, as the case may be, must further determine that the proposal will have no detrimental effect on the safety of vehicular or pedestrian traffic.*

Conclusion: Technical Staff noted that public sidewalks and crosswalks are available in front of the site and throughout the central business district and concluded that the proposed use will not jeopardize such facilities in any way. The Hearing Examiner finds that the proposed use would have no detrimental effect on the safety of vehicular or pedestrian traffic.

C. Specific Standards

The testimony and the exhibits of record [including the Technical Staff Report (Ex. 16)] provide sufficient evidence that the specific standards required by Section 59-G-2.38 are satisfied in this case, as described below.

Sec. 59-G-2.38 Offices, professional, non-residential

An existing single-family structure may be used for professional office purposes by any member or members of a recognized profession, such as doctors, lawyers, architects, accountants, engineers, veterinarians, but not including the following:

- a) Medical, dental or veterinarian clinics*
- b) In-patient treatment facilities*
- c) General business offices, such as the offices of insurance companies, trade associations, manufacturing companies, investment concerns, banks or real estate companies.*

Conclusion: The proposed use is consistent with the permitted professional office

purposes. While the psychologist's office might be described as a clinic, it will be for psychological counseling sessions, not medical treatment. Technical Staff indicates that these sessions are longer, and the level of activity is much lower, than in a medical clinic. No psychiatrists (who are Medical Doctors) are in the practice.

The property must be:

- a) Located in a central business district that is designated as being suitable for the transit station-residential (TS-R) zone on an approved and adopted sector plan; **or***
- b) Designated as being suitable for nonresidential professional offices in the R-60 zone on an approved and adopted master or sector plan and is located along a major highway with an existing right-of-way width of no less than 90 feet or along a portion of an arterial road designated as a boundary of a central business district.*

Conclusion: The property is not in the CBD, so it does not meet criterion "a." However, it does meet criterion "b" because it is designated by the Master Plan as suitable for this special exception in the R-60 Zone, and Cedar Street is an arterial road designated as a boundary of a central business district.

The Board must find that the property meets the following criteria:

- a) Such use will not constitute a nuisance because of traffic or physical activity;*

Conclusion: As noted by Technical Staff, the use will not constitute a traffic nuisance because activity will be by appointment only and will be of a low intensity. The use will occur primarily indoors and will not contribute noise or visual intrusion to the community. The appearance of the use will be residential.

- b) Such use will not affect adversely the use and development of adjacent properties;*

Conclusion: Dr. Nadeau testified that nothing being done by Petitioners would adversely affect adjacent properties. Tr. 51-55. Technical Staff indicated that no changes in access or abandonment of easements are proposed, nor will subdivision be necessary. In the absence of any evidence of adverse consequences on the neighbors, the Hearing Examiner finds that the proposed use will not affect adversely the use and development of adjacent properties.

- c) A minimum of 25 percent of the lot area will be devoted to green area.*

Conclusion: Technical Staff determined that more than half of the property is landscaped yard or pathways, which qualify as green area. Dr. Nadeau testified that even after the addition is completed, much more than 25% green area will remain.

d) The Board may allow the exterior of the premises to be changed, altered or modified provided the single-family character and the basic residential appearance of the building is retained.

Conclusion: Considering the scale and architectural appearance of the proposed addition, Technical Staff concluded that the single-family character of the building will be retained through the proposed modification. The Hearing Examiner agrees.

D. Additional Applicable Standards

59-G-1.23. General development standards.

(a) Development Standards. Special exceptions are subject to the development standards of the applicable zone where the special exception is located, except when the standard is specified in Section G-1.23 or in Section G-2.

Conclusion: Petitioners meet the applicable development standards, as demonstrated in the following matrix from the Technical Staff report:

Comparison of Development Standards (includes addition):

Item	Required	Proposed
Lot Area	6,000 ft.	5000 ft. ³
Minimum lot width at front building line	60 ft.	50 ft. ⁴
Minimum Building Setback from Street	30 ft. ⁵	30 ft.
Minimum Building Setback from Side of lot.	8 ft. one side. 18 ft. sum of both sides.	8 ft. one side. 18 ft. sum of both sides.
Minimum Building Setback from Rear of Site	20 ft.	41 ft.
Maximum Coverage	35 percent	15 percent
Maximum Building Height	35 ft.	34 ft.

(b) Parking requirements. Special exceptions are subject to all relevant requirements of Article 59-E.

³ Building is conforming per Code § 59-B-3, as the lot was legally recorded by subdivision plat before June 1, 1958. "Evanswood" Sec. 1 (Plat # 439) was recorded on Feb. 11, 1932.

⁴ See note # 3.

⁵ Minimum setback from street for the zone is 25 feet, per Code § 59-C1.323; however, this lot is subject to the applicable established building line of 30 feet, per footnote six and Code §59-A-5.33.

Conclusion: As noted previously, the subject site is within the Silver Spring Parking Lot District. According to Technical Staff, the current area of the subject site would require five parking spaces. The proposed addition would require approximately two more spaces. The additional spaces required beyond the four on-site would be provided in the parking district, which would result in a parking assessment Petitioners have agreed to pay. Tr. 55-56.

(c) *Minimum frontage* * * *

Conclusion: Not applicable.

(d) *Forest conservation. If a special exception is subject to Chapter 22A, the Board must consider the preliminary forest conservation plan required by that Chapter when approving the special exception application and must not approve a special exception that conflicts with the preliminary forest conservation plan.*

Conclusion: Not applicable.

(e) *Water quality plan. If a special exception, approved by the Board, is inconsistent with an approved preliminary water quality plan, the applicant, before engaging in any land disturbance activities, must submit and secure approval of a revised water quality plan that the Planning Board and department find is consistent with the approved special exception. Any revised water quality plan must be filed as part of an application for the next development authorization review to be considered by the Planning Board, unless the Planning Department and the department find that the required revisions can be evaluated as part of the final water quality plan review.*

Conclusion: Not applicable.

(f) *Signs. The display of a sign must comply with Article 59-F.*

Conclusion: As indicated earlier in this report, under Code §59-F-9.1(a), the two square foot sign proposed by Petitioners requires a permit because it will be permanently posted in a residential zone and does not meet any of the exceptions listed in Code §59-F-8. A condition is therefore recommended requiring a permit prior to posting of the sign.

(g) *Building compatibility in residential zones. Any structure that is constructed, reconstructed or altered under a special exception in a*

residential zone must be well related to the surrounding area in its siting, landscaping, scale, bulk, height, materials, and textures, and must have a residential appearance where appropriate. Large building elevations must be divided into distinct planes by wall offsets or architectural articulation to achieve compatible scale and massing.

Conclusion: As mentioned above, Technical Staff concluded that the single-family character of the building will be retained through the proposed addition. The Hearing Examiner agrees, but has also recommended making that a condition of the special exception grant.

(h) *Lighting in residential zones. All outdoor lighting must be located, shielded, landscaped, or otherwise buffered so that no direct light intrudes into an adjacent residential property. The following lighting standards must be met unless the Board requires different standards for a recreational facility or to improve public safety:*

Conclusion: Dr. Nadeau testified that the outside lighting will be residential in character. Tr. 53. Technical Staff confirmed this assertion, stating the proposed lighting will provide safe access for clients to the use during hours of lower daylight, particularly in winter, and the lighting is typical of any residential use. In addition, privacy fences will be erected on both sides of the subject property, based on consultation with the neighbors.

Based on the testimony and evidence of record, I conclude that the non-residential professional office use proposed by Petitioners, as conditioned below, meets the specific and general requirements for the special exception, and that the Petition should be granted, subject to the conditions set forth in Part V of this report.

V. RECOMMENDATION

Based on the foregoing analysis, I recommend that Petition No. S-2621, seeking a special exception for a non-resident professional (psychologist's) office use, located at 8607 Cedar Street in Silver Spring, Maryland, be GRANTED, with the following conditions:

1. Petitioners shall be bound by all of their testimony and exhibits of record, and by the testimony of their witnesses and representations of counsel identified in this report.
2. Petitioners shall participate in the Silver Spring Parking Lot District Program and pay the *ad valorem* tax in lieu of satisfying the number of required parking spaces that are not on the site.
3. The special exception will operate with a maximum of five mental health practitioners each working a 40 hour week, or the equivalent (*i.e.*, a maximum of 200 mental health practitioner hours per week, whether or not there are more than five practitioners working in any given week).
4. Petitioners will keep a log or other non-confidential record of the hours that each person is working at the subject site, which will be available for review, upon request, by the Department of Permitting Services.

5. The hours of operation will be 7:30 a.m. to 9 p.m., Monday through Friday, and 9 a.m. to 5 p.m. on Saturday, but Dr. Nadeau may use the subject site on Sunday to do administrative work.
6. Petitioners will make information available to clients about the local public parking facilities.
7. There will be no more than one group session at any one time, and no more than three group sessions per week. A maximum 8 clients will participate in any group session.
8. Petitioners may not post the sign proposed in Exhibit 10 until they obtain a permit therefor pursuant to Code §59-F-9.1(a).
9. The Board's approval of the special exception, including the proposed addition which will modify the exterior of the premises, does not excuse Petitioners from obtaining all necessary permits for the addition and maintaining the residential character of the structure.

Dated: December 10, 2004

Respectfully submitted,

Martin L. Grossman
Hearing Examiner